

And Just Like That... is Flex in the City the New Way of Working?

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The article will explore the development of different labour models and their regulation. This includes the evolution of the traditional employment model to accommodate greater flexibility (in terms of how, when and where work is performed), as well as the increasing adoption of non-traditional arrangements, such as agency and platform-based models. The article will address the impact that the pandemic has had on these trends. It will also consider attempts to put a regulatory framework around novel employment models at an EU level. The piece will focus on developments in Ireland, but comparisons will be drawn with the UK and other EU jurisdictions where appropriate.

Introduction

In January this year, the Irish Government gave the green light for employees to return to the office on a phased basis as appropriate to each sector. Despite this, we are unlikely to see a full-scale return to work life as we knew it pre-pandemic.

Covid-19 has been a major catalyst in the shift away from a more traditional view of our work patterns, but there are many other factors acting as a driving force behind this change. The reasons for employees seeking more flexible work arrangements are many and varied.

They include anything from parental or caring responsibilities, to greater work-life balance or access to opportunities that would otherwise be limited by geographical location.

New ways of working

The 'traditional' employment model is now rapidly evolving to accommodate greater flexibility in terms of how, when, and where, work is performed. There is no 'one size fits all' solution to demands for flexibility.

Workers are increasingly open to non-traditional employment models, such as:

- full remote work, with no requirement to attend an office in-person;
- a hybrid approach, where time is split between remote work and time on-site;
- agency work, where a worker is employed by an agency and temporarily assigned to an end-user;
- a platform-based model, whereby established professional service firms vet external professionals, who are then placed with clients on a short-term basis or for a specific project; or
- a platform-based model, where professionals with an existing client base retain control of their own schedule and workload, but in exchange for a commission, has access to all the resources of an established firm.

As it would be impossible to cover every legal issue that can arise due to the demand for flexible work, this article aims to give an outline of key issues affecting organisations which are navigating a new work landscape and give an overview of some newly introduced measures.

The regulatory landscape

Terms and conditions of employment

Employees, whether undertaking a traditional or more contemporary



model of work, must be made aware of the terms and conditions of their employment. The Terms of Employment (Information) Act 1994 – 2014 obliges employers to provide a written statement, within 5 days of the commencement of a contract, of the core particulars of the contract (which includes the number of hours the employee is expected to work per normal working day and per normal working week). Additionally, a written statement of the terms and conditions of employment must be provided to an employee within two months of their start date, which, crucially, must specify the place of work.

Employers are obliged to inform an employee of the nature and date of any amendment to the terms of such written statements. As employers navigate the return to the workplace, the introduction of any flexible working arrangements will need to be reflected in contracts of employment of existing employees and any new hires.

Health and safety

The most pressing health and safety concern of late has undoubtedly been infection prevention and control, with the Government introducing restrictions that forced many workplaces to close.

Employers are not absolved from their obligations to provide a safe working environment because employees are working remotely. Under the Health, Safety and Welfare at Work Act 2005, they must ensure, as far as is reasonably practicable, their employees' health, safety, and welfare at work.

One concern linked to remote work is potential liability and implications for insurance cover. For example, In December last year, a German court ruled that a man who slipped and injured himself while walking from his bedroom to his home office was technically commuting and could claim workplace accident insurance.

Policies and procedures need to be up to date and risk assessments need to be conducted, whether an employee is working on site or not. Information, instruction, and training

need to be provided, suitable work equipment may be required, and employers need to ensure they are monitoring, reviewing policies, and communicating with employees regularly.

Conversely, some employers may have concerns about a full-scale return to the office and the spread of Covid-19. Employers should consult the Transitional Protocol: Good Practice Guidance for Continuing to Prevent the Spread of Covid-19 and continue to observe good measures such as handwashing, respiratory hygiene, and ventilation. The guidance is good practice guidance and although does not have the force of law, compliance with its provisions will assist in defending any potential claims regarding the safety of the workplace.

Organisation of Working Time Act 1997 (the OWTA)

The OWTA sets out the statutory rights of employees regarding maximum working hours, rest breaks and annual leave. When staff work remotely, it becomes more difficult for an employer to effectively monitor employees and ensure they are compliant with the provisions of the OWTA.

Employers are obliged to keep records of their employee's working hours, rest breaks, annual leave, public holidays, and daily and weekly rest periods. It is much harder to keep on top of this obligation when employees are working remotely when they are not clocking in and out of a physical building. Employers should review their methods of monitoring and recording working hours to ensure they are effectively complying with their obligations under the OWTA.

Employees should be made aware of their rights to take regular breaks throughout the day, as well as their entitlements to annual leave and public holidays. That being said, the duty to ensure compliance with the OWTA rests with the employer.

Right to Disconnect

Another potential issue that arises with respect to working hours

and rest breaks is the blurring of lines between work and home life, especially for those working remotely or working on a hybrid basis. The 'right to disconnect' gives employees the right to switch off, and to refrain from sending or answering work emails, phone calls or texts outside of their 'normal' working hours.

Discussions around the right to disconnect predates the pandemic. For example, France enshrined this right in their Labour Code as far back as 2016. The Covid19 crisis has, however, undoubtedly highlighted the importance of this issue. In the future, we could see an EU-wide right to disconnect. In 2021, the European Parliament passed a resolution calling on the Commission to prepare a draft directive that would enshrine the right of digital workers to disconnect outside of their working hours.

In the meantime, protections exist in Ireland as the Workplace Relations Commission (the WRC) published a Code of Practice on the Right to Disconnect (the Code) in April 2021.

The Code of applies to all types of employment, including those who work onsite, those who work remotely, or where employees are mobile. Failure to abide by the Code is not an offence, however non-compliance could be used as evidence by an employee taking proceedings before the WRC.

The Code compliments the health and safety and organisation of



working time regimes, by providing guidance on how to handle situations where employees are contactable outside of normal working hours. The three main elements in the Code are:

- employees have the right not to be routinely expected to work outside their normal working hours;
- employees have the right not to be penalised for refusing to work outside their contracted hours; and
- both employers and employees should respect the rights of others, by not calling and emailing outside normal working hours.

This right should be considered in tandem with the obligation to provide a safe working environment. The 'always on' culture could potentially lead to greater levels of stress, mental health issues and burnout among employees. Even for employees who do not work remotely, the availability and common usage of technology means anyone is susceptible to working outside of normal hours. No matter the working arrangements for staff, employers should familiarise themselves with the Code and have Right to Disconnect Policies in place for all staff.

Right to request remote work

In response to the increased demand for flexible work options, the Government recently published the draft scheme of the Right to Request Remote Work Bill 2021 (the

Bill). Under the terms of the Bill, employers will be obliged to establish and maintain a Remote Working Policy, detailing how requests for remote work are to be managed, and the conditions which will apply to remote working generally within the organisation. As currently drafted, employees will be entitled to submit a request to work remotely once they have completed six months service. An employer must give a written response to such request within twelve weeks.

An employer may decline a request after giving the request due consideration. The Bill sets out an indicative, non-exhaustive list of factors which may be considered including, amongst others, the nature of the work, potential impact on quality of business product or services, cost implications for the employer, or concerns relating to confidentiality, intellectual property, health and safety, or data protection.

Although the Bill does not propose to introduce an absolute right to work remotely, it does demonstrate a recognition and acceptance of society's changing attitude to the way in which we work.

Work Life Balance Directive

In August 2019, a new EU Directive on Work Life Balance (2019/1158) entered into force and has a transposition deadline of August 2022. This Directive predates the pandemic and demonstrates that the

importance of flexible arrangements has been a hot topic, even before Covid19.

Although Ireland has not yet implemented transposing legislation, this Directive will introduce a right for all working parents with children up to 8 years old, or those with caring responsibilities, to request flexible work arrangements.

Flexible working arrangements are broader than remote or hybrid-work and allow an employee to seek to adjust their work patterns. Like the right to request remote work, this is a right to request arrangements, and does not oblige employers to grant the request. In addition, the Directive calls on Member States to protect against discrimination or less favourable treatment for those who request such working arrangements.

Conclusion

We will likely see a return to the traditional workplace in a number of different ways and some workplaces will likely be figuring out what works for them on a 'trial and error' approach. Remote, hybrid, and flexible working arrangements will become more common and as they do, we will likely see the introduction of new legislation and guidance to help employers and employees alike navigate the changing work landscape.



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